No.....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

IDAHO POTATO GROWERS, INC.,
et al,
Petitioners

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion and Decree of the Court Below

The opinion of the Circuit Court of Appeals for the Ninth Circuit, which the petitioners now seeks to have reviewed by this Court, is contained in the record at pages 749 to 797, and the decree is contained in the record at pages 798 to 803. The order of the court is found in the record at page 798, and as findings the court adopted the findings of the trial examiner (R. 788).

Jurisdiction

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by

the Act of February 13, 1925 (28 U. S. C. A. 347) and under section 10(e) of the National Labor Relations Act of 1935 (29 U. S. C. A. 160(e)).

Statement

Statement of the pertinent facts in this case is made in the foregoing petition on pages 3 to 11.

Specifications of Error

The errors which the petitioners will urge, if the writ of certiorari is granted, are that the Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

(1) In holding that laborers engaged in cleaning, culling, grading and sacking potatoes without changing their character from raw farm produce, on the farm where produced, and at the expense of the farmer-producer, are not agricultural laborers within the meaning of the National Labor Relations Act.

(2) In holding that laborers engaged in grading and sacking potatoes for the farmers, on the farm where produced, are not agricultural laborers excepted from the National Labor Relations Act, where it happens that such farmer also owns a warehouse in which other employees grade and sack potatoes grown and owned by others.

(3) In holding that both the laborers on the farm and at the warehouse are a single bargaining unit,

and are, and said farmer is, subject to the National Labor Relations Act.

(4) In holding that laborers engaged in grading and sacking potatoes identically with such work on a farm for a farmer, when done in a warehouse owned and operated by a cooperative organization of farmer-producers, and upon potatoes owned by farmer-producers, and at the farmer-producer's expense, are not agricultural labors within the meaning of the Act.

(5) In holding that laborers, engaged in grading and sacking potatoes at the expense of the farmer-producer, when done on a farm, or in a warehouse owned and operated by a person who buys only the portion of the potatoes attaining grade known as U. S. No. 1, are not agricultural laborers.

(6) The court erred in holding that the farmer-producers, farmer cooperatives, farmer-producer-warehouse owners, warehouse owners and buyers, together with traffic associations, may be joined in one action and proceeding and may be guilty of unfair labor practices.

(7) In holding and deciding that meetings of farmer-producers protesting the unionization of agricultural laborers constituted unfair labor practices, and in ordering collective bargaining with respect to all such laborers, and all such employers, without distinction.

(8) In holding that a demonstration of farmers at their public meetings, held in protest of the unionization of their employees, constituted unfair labor practices, and in so holding, by implication, extended the National Labor Relations Act so as to constitute a denial of the right of free speech to farmers in violation of the first amendment to the Constitution of the United States.

(9) In entering a decree for mandatory injunction which is vague, indefinite and uncertain.

(10) In holding that a laborer who works regularly on a farm is not an agricultural laborer because during the packing season he *prepares* the product of the soil *for market.*

(11) In holding that the doctrine in the case of North Whittier Heights Citrus Ass'n vs. NLRB, 9th CCA, 109 Fed. (2d) 76 is applicable to the facts in this case.

(12) In holding that the "common denominator" theory of construing the exceptions in the Act of Congress is applicable in this case.

(13) In failing to apply the term "agricultural laborer" as found in the National Labor Relations Act, in harmony with the identical term in other Federal Acts, i.e., Fair Labor Standards Act and Social Security Act, and in harony with the identical term as understood and applied locally, i.e., within the State of Idaho.

Argument

I.

WHERE ONE OWNS A FARM AND EMPLOYS PERSONS TO PLANT, CULTIVATE, HARVEST AND SORT THE POTATOES GROWN ON THE FARM AND THE SORTING IS DONE ON THE FARM, THE EMPLOYEES ARE AGRICULTURAL LABORERS WITHIN THE MEANING OF SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT.

Section 2(3) of the Act excludes from coverage "agricultural laborers"; yet, the Board ordered, and the Court by its enforcing order is compelling, the petitioners who are also farmers to deal with all of their employees collectively who work on a farm cellar crew even though the crew may include the farmer himself; and even though the farmer is sorting potatoes grown by him on his own farm and the sorting is performed on the farmer's own farm where the potatoes have been grown, and his crew members are his regular farm hands who have helped plant, cultivate and harvest the identical potatoes being sorted.

Judge Fee, who concurred in the majority opinion solely on the assumption that farm cellar crews were not included in the order (R. 797) (an assumption unfounded) stated the point very clearly when he said:

"As a specific example of the application of the

doctrines to one phase of this case, W. P. Wilson grew on his own land, certain potatoes which he harvested and sorted by means of a cellar crew in his own employ on his own land. If the implication of the findings of the Board, as affirmed by the majority, are that he must employ a union crew under such circumstances simply because he also warehouses and sells potatoes bought from others, then no potato grower in Idaho can escape regulation, notwithstanding the plain language of Congress. If as realists, we take any account of the facts, there is then no obstacle to the extension of like organization and regulation of agricultural laborers in the operations of planting the seed and preparing the ground.

"The findings of the Board that members of the cellar crew engaged under such circumstances in the work of the farm, were not agricultural laborers, accords neither with the fact nor the law. This court should not lend support to such doctrine based on the fanciful analogy of other cases, or at all." (R. 794.)

The above statement is also applicable to the petitioners Stuart, Holden Brothers, O'Neil, and Idaho Falls Bonded Warehouse, a family corporation.

The word "agriculture" is a most comprehensive word. It is the science and art of cultivating the soil and growing produce, including every process and step

incident to the completion of the products for consumption and market. It is broader than farming and includes the raising and harvesting of crops and all things incident thereto.

> 2 Am. Juris. 395; *Stuart, Collector vs. Kleck*, 129 F. (2d) 400 (9th C.C.A.); *Gaylord Guernsey Farms vs. Jones*, 41 Fed. Supp. 367; *Smythe vs. Pheonix*, 63 Idaho 585; 123 Pac. (2d) 1010; *Batt vs. Unemployment Compensation Div.*, 63 Idaho 572; 123 Pac. (2d) 1004; 139 A.L.R. 1157; *United States vs. Northern Pacific R. Co.*, 311 U. S. 317 at 361, 85 L. ed. 210 at 235; *Big Wood Canal Co. vs. Unemployment Compensation Div.*, 61 Idaho 247; 100 Pac. (2d) 49; *Cook vs. Massey*, 38 Idaho 264; 230 Pac. 1088; 35 A.L.R. 200.

It is respectfully submitted that the court below, by its opinion and decree, has erroneously interpreted and applied the words "agricultural laborer" in this case, and if its order stands will compel these petitioners, as farmers and engaged in farming, to deal collectively through the Union with their farm employees, when such result was never the intention of Congress when the Act was passed.

II.

THE FACT THAT A FARMER, WHO GROWS HIS OWN POTATOES ON HIS OWN LAND, ALSO WAREHOUSES AND SELLS POTATOES GROWN BY OTHERS, DOES NOT MAKE HIS CELLAR

CREWS WHO PREPARE HIS OWN POTATOES, IN HIS OWN CELLARS, ON HIS OWN LANDS, NON-AGRICULTURAL LABORERS.

The Board and the lower court disregarded the distinction that should have been made between the crews that worked in the warehouses away from the farms and those crews that worked in the cellars on the farms, and as a result of the affirmance of the order by the lower court and the issuance of its injunction, the petitioners, who are also farmers, are confronted with a mandatory order, which, if carried to its logical conclusion, will force the farmers to recognize the Union in dealing with each and every one of their farm employees who happens to be a member of a cellar crew working in their own cellars and sorting their own potatoes.

III.

THE LOWER COURT HAS PROJECTED THE NATIONAL LABOR RELATIONS ACT INTO THE RELATIONSHIP OF THE FARMER TO HIS FARM LABOR.

The lower court based its decision that the employees in this case were not agricultural laborers, and hence not excepted from the Act, upon its own decision in North Whittier Heights Citrus Association v. National Labor Relations Board, 109 Fed. (2d) 76 (Cert. denied, 310 U.S. 632). The "big business" aspect of the operations in the latter case was determinative of

the court's definition of agricultural laborer—again and again the court emphasizes the size of the operations—"the vast and comprehensive system"; the "large industry" separated from the farm; the common denominator of smallness in the Act's exceptions; the farmer and his "hired man"—the "great industry" —the control of "a great selling organization." In that case one operator, the Association, encompassed the whole field; all similar operations of the area were consolidated into one place off the farm, under one management, at one time, with one group of laborers.

Assuming, for argument, that such conditions justified exclusion of the laborers therein involved from the generalization "agricultural laborers" contained in, and excepted from the National Labor Relations Act, no like conditions prevail in this case.

Here is no "vast and comprehensive system", "great industry", "great selling organization" processing potatoes at a single central place off the farm with a single group of laborers. On the contrary here is just the opposite. Here are nine separate persons or entities within a single area; here are small separate crews—here is labor performed in the numerous individual cellars, on the individual farms, for and at the expense of the individual farmer, upon the individual farm produce, frequently by the farmer himself, his hired men, his neighbors. Here is not "product of the soil (leaving) the farmer, as such, and (entering) a factory for processing and marketing * *"

True, processing was also accomplished for other producers in the several and separate warehouses of petitioners, and, though we think this too was agricultural labor and excepted from the Act, if, for the moment and for argument, it be true that the workers in the warehouse were not agricultural laborers and that the North Whittier Heights case was applicable to them, it does not follow that for that reason the farm cellar workers on the individual farms lost their status as agricultural laborers, or the individual petitioner farmers and producers lost their status as such as to their own produce, self-processed, and their farm cellar men.

The court has misapplied its own reasoning and definition, and the Board and the court by the joinder and confusion of the complaints, the laborers, the petitioners, and the conditions, has limited and circumscribed the meaning of "agricultural laborer" beyond all common understanding and intention of Congress, and has projected the National Labor Relations Act into the relation of the farmer with his employees on the farm.

That size of operation was not the Congressional test of agricultural labor is indicated by the Committee Report (Senate No. 573, May 2, 1935, 74th Cong. 1st Sess.) from which is quoted:

> "For administrative reasons the committee deemed it wise not to include under the bill agricultural laborers * * * But after deliberation, the

committee decided not to exclude employees working for very small employer units. The rights of employees should not be denied because of the size of the plant in which they work * * *"

The "common denominator" theory of exemption used by the lower court is directly contrary to such expressed intent of Congress, and has no bearing upon the definition of "agricultural laborer".

Exemptions from the operation of a statute made in detail preclude their enlargement by implication.

Addison v. Holly Hill Fruit Products, 88 L. Ed. Advance Opinions No. 16, p. 1123.

IV.

THE LOWER COURT HAS USED A WRONG BASIS FOR ITS DETERMINATION OF THE MEANING OF "AGRICULTURAL LABOR", AND DEFINED THE TERM IN CONFLICT WITH ITS ACCEPTED MEANING IN THE STATE OF IDAHO, AND BY CONGRESS.

As hereinbefore stated the lower court bases its order against petitioners upon its definition of agricultural labor as contained in its own decision in the North Whittier Heights case. It reasoned in that case that processing fruit was not intended by Congress to become within the exception of agricultural labor largely because of the large size of the operation—that if the operation was large, and off the farm, the labor,

though identical in character and purpose and though performed for the individual farmer at his expense, and though a necessary operation in the production of a finished, marketable product of the soil, ceased to be agricultural. By so doing it imposed an unequal burden upon farm produce and discriminated between farmer and farmer, and identical produce.

Applied to potatoes, involved in this proceeding, both producer A and producer B are required, in order to move potatoes off the farm and make them usable, consumable, saleable farm produce, to process them, that is to say, to separate the potato from dirt, vines, etc., to discard cut, bruised, ill shapped and cull potatoes, to grade according to the requirements of the State and Federal laws and agencies. So far as nature is concerned a potato is fully matured, grown and produced underground, but is useless and unfinished until harvested. Harvesting is beyond doubt agricultural labor, yet it only raises the potato above ground; in the mass the potatoes harvested are not consumable, nor marketable; they must as a necessary, and legal, incident to the farmer's completion of production for market, be processed. That processing is well understood to be an agricultural operation. Sometimes it is done on the farm by the farmer and his self hired crew, (producer A) particularly by the large owner or producer who is best able to gather a crew and furnish employment for larger crews for a longer time on large production. The smaller producer or

farmer (producer B) cannot so well himself perform this necessary operation; he must procure it by co-operation action, the forming of co-operative organizations, or by bringing his field run produce into a central warehouse where his and the produce of others can more economically be handled. Yet in all cases the produce is the farmers until processing is completed (after which the part reaching the required grade, enters the market, and the balance remains the farmer's), and in all cases the expense of processing is borne by the farmer.

Now clearly producer A and his employees though perhaps large in number are engaged in agricultural labor and excepted from the Act. Under the North Whittier Heights case the lower court has denied the exception to producer B and his labor. Under the present decision in the petitioners' cases both conditions exist and the petitioners and their laborers whether on or off the farm, are massed by the court into a whole, treated as a single bargaining unit and the whole denied the exception of the Act.

In Idaho under either conditions the labor is and has been recognized and understood to be agricultural labor. Thus where Batt was a producer of vegetables, including potatoes, which he processed at processing sheds off the farm; also at such sheds processed the produce of others; also purchased the graded produce; also acted as selling agent for graded produce of others —the Idaho Supreme Court held that the labor involved

in processing all such produce was agricultural labor within that general term as used in the exception to the Unemployment Compensation Act, which at that time was identical with the National Social Security Act and the term in the National Labor Relations Act. Batt v. Unemployment Compensation Division, 63 Idaho 572, 123 Pac. (2) 1004.

The Idaho Supreme Court has held threshing to be agricultural labor. Cook v. Massey, 38 Idaho 264, 220 Pac. 1088. The lower court here based its decision on its North Whittier Heights case, upon the decisions of other jurisdictions contra. The lower court also here based its decision upon its own National Labor Relations Board v. Tovrea Packing Co., 111 F. (2) 626, holding feeding lot operations non-agricultural. In Idaho the contrary is the customary and usual idea of what is agricultural labor where such general term only was used in the statutory exception. Carstens v. Ind. Acc. Bd., 63 Idaho, 613; 123 Pac. (2) 1001. Smythe v. Phoenix, 63 Idaho 585, 123 Pac. (2) 1010. So in Idaho employees of a farmer co-operative delivering water for irrigation are engaged in agricultural labor, excepted from Unemployment Compensation Laws, where only the general term was used in the statute. Big Wood Conal Co. v. Unemployment Comp. Div., 61 Idaho 247. See also as to agricultural labor, under more specific statutory definition, Big Wood Canal Co. v. Unemployment Compensation Division, 63 Idaho 785, 126 Pac. (2) 15; Carstens Packing Co.

v. Unemployment Compensation Division, ... Idaho .....; 144 Pac. (2) 203.

The lower court in this case (since its definition of agricultural labor is based on the North Whittier Heights case) adopted as one criteria of such labor "common usage".

> "Enlarge the meaning of any of these terms beyond their common usage and confusion results."

and

> "the usual idea that the term suggests."

In the instant case the lower court has decided what is agricultural labor in Idaho contrary to, and in conflict with, comon usage and the usual idea, as expressed by the Supreme Court of Idaho and has thereby introduced confusion.

Another criteria of the lower court was the size of the operation—a most uncertain measure, since size is a relative conception, and most likely to result in confusion even between localities within the same area. Out of this came the courts conception of intent of Congress by virtue of a so-called "common denominator" between exceptions from the Act, such denominator being size or extent—if large it was not agricultural labor, if small, it was. But Congress itself repudiated both "common denominator" and size, as tests of inclusion or definition;

> "For *administrative* reasons the committee

deemed it wise not to include under the bill *agricultural laborers*, persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse. But after deliberation, the Committee decided *not to exclude employees working for very small employer units.* The rights of employees should not be denied because of the *size* of the plant in which they work. Section 7 (a) (National Industrial Recovery Act) imposes no such limitations. * * *" (Emphasis ours.)

Senate Rep. No. 573, May 2, 1935, 74th Cong. 1st Sess.

In respect to the Social Security Act (equally applicable to the National Labor Relations Act) the Fifth Circuit Court of Appeals said of the general term "agricultural labor":

"Congress * * must be regarded as having in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When, then, Congress in passing an act like the Social Security Act, uses in laying down a broad general policy of exclusion, a term of as general import as "agricultural labor", it must be considered that it used the term in the sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, *as that term is understood in the various sections of the United States where the Act*

operates * * it must be interpreted broadly enough to embrace in it all kinds and forms of agriculture practiced *where it operated*, that its generality reasonably extends to * * * * *." (Emphasis ours.)

U. S. v. Turner Turpentine Co., 111 F. (2) 400.

Congress could have, but did not, restrict the generality of the term "agricultural laborer". It repudiated size of operation, of place of operation, as a criteria and the "common denominator" theory of the lower court as determinative of the extent of exception. The lower court failed to consider and apply the Idaho usual idea and common usage of the term. It even restricted the meaning so as to apply the Act to the farmer and his hired man upon the farm—the so-called "cellar men". Its decision results in confusion, for its result is to confuse the farm laborer with the agricultural laborer in the warehouse, treating both as within the Act; it confuses in that it ascribes a different meaning to the same general words used in different acts of Congress so that the same laborer or employee and employer are not subject to the unemployment provisions of the Social Security Act of Congress, or of the State of Idaho, nor subject to the Fair Labor Standards Act of Congress, but subject to the National Labor Relations Act.

V.

IT WAS ERROR FOR THE BOARD TO JOIN ALL THE PETITIONERS IN ONE PROCEEDING

AND THIS HAS RESULTED IN AN UNCERTAIN, VAGUE AND INDEFINITE DECREE BY THE COURT.

It was error for the Board to join in one proceeding the claims of unfair labor practices against all of the petitioners.

In his concurring opinion Judge Fee said:

"The initial confusion was caused when the attempt was made to organize cellar crews and warehouse crews in one union, notwithstanding the direct language of the Act preventing organization of the agricultural laborer.

"The Board made this confusion worse confounded by entertaining the joinder in one proceeding of a claim of unfair labor practices against (1) a farmer who raised, processed and marketed potatoes of others as a dealer, (2) a non-profit cooperative, grading, sorting and dealing in potatoes of farmer-members, and (3) a traffic association which consisted not only of those above mentioned, but of strict commercial dealers also. * * * * * *

"The Board also complicated the situation, following the lead of the union, by its consideration of an order based upon, and relating without differentiation to, the various types of work done on land in the possession of the farmer, or in his cellar, and work done in commercial warehouses and pro-

cessing of potatoes for shipment in interstate commerce." (R. 792-893.)

The petitioners at all times opposed their joinder in one proceeding (R. 82); the refusal of the Board to separate the various types of persons, firms and corporations, and have separate hearings and separate orders entered has led to the direct result we have here; that is, the utmost of confusion. There is so much confusion that Judge Fee who sat in the case in the Circuit Court states:

> "No language in the order of the Board expressly directs any of the plaintiffs to do, or to cease and desist from doing, anything with respect to members of cellar crews. There is nothing in the order to preclude plaintiffs from assembling such crews of unorganized workers separately from the warehouse crews, or to prevent farmers, either separately or cooperatively, from hiring their own cellar crews. Therefore, the writer concurs in the result. *If the order of the Board could be interpreted by reference to relate to cellar crews, the writer would be compelled to dissent.*" (R. 797.) (Emphasis ours.)

Judge Fee may be correct in his statement that there is nothing in the order of the Board relating to cellar crews or to prevent farmers from disregarding the entire orders insofar as their cellar crews are concerned. However, the Board ordered petitioners to cease and desist from doing certain things, and to do other

things, with respect to the units found by the Board to be appropriate (R. 72) and the Board found that the cellar and warehouse crews of each and every petitioner, exclusive of foremen and supervisory employees, constitute units appropriate for collective bargaining (R. 71).

The Circuit Court entered its order in this case and it covers all employees of the petitioners "in each of the units found above to be appropriate for the purpose of collective bargaining" (R. 799).

Judge Fee apparently believes that the reference to the units in the order of the court does not refer back to cellar crews.

If a contempt proceeding should be initiated against the Idaho farmers, who are petitioners herein, we do not know whether Judge Fee's interpretation of the court's order would be a defense, for it may be presumed as a matter of law that an Idaho farmer is supposed to know more about the meaning of an order of injunction than a Federal Judge who is a member of the court that issues the injunction. Any judgment or order of a court should be sufficiently definite so that it can be understood not only by the litigants but by the enforcing officers.

Hedrick v. Lee, 39 Idaho 42; 227 Pac. 27.

A decree, to be operative, must contain sufficient certainty in itself. It cannot be aided by presumption.

Watts v. Waddle, 6 Peters 389; 8 L. Ed. 437.

This is especially true in orders putting into force and effect an injunction.

21 C.J. 658.

VI.

THE WORDS "AGRICULTURAL LABOR" SHOULD BE CONSTRUED BY THIS COURT BECAUSE OF THEIR USE IN THE SEVERAL ACTS OF CONGRESS AND THE VAST NUMBER OF PEOPLE AFFECTED THEREBY.

The National Labor Relations Act specifically excludes any individual employed as an agricultural laborer. The Fair Labor Standards Act does, and the Unemployment Compensation Act originally did and now more specifically does exclude agricultural labor. The various states have enacted laws which exclude agricultural labor from coverage, especially workmen's compensation laws and unemployment insurance acts. As a result, there is diversity in the decisions as to the meaning of the term "Agricultural Labor".

Whatever may be said as to the difference in the wording of the Acts of Congress, it must be conceded that the rights and liabilities of millions of Americans may be affected by the correct definition of the words "Agricultural Labor".

Organized labor is entitled to know where its legitimate field of organization ends. The numerous per-

sons employed on farms and in the processing of farm products have the right to have finally settled the boundary line between agricultural labor within the meaning of the act, where the employer and employees are not subject to the act and industrial labor, where the employer and employees are subject to the act. The millions of farmers of America and the great cooperative marketing associations composed of farmers are entitled to a clear exposition of the words "Agricultural Labor", so that they will know whether their operations are covered or are not covered and whether they and their employees have the liabilities imposed upon the one, and the rights guaranteed to the order.

We appreciate that this court denied the petition for a writ in the North Whittier Heights Citrus Association, a cooperative marketing organization, but as hereinbefore pointed out, in our opinion, the North Whittier Heights Citrus Association case does not go nearly so far and does not have the implications that this case has.

Judge Fee in his concurring opinion in this case stated:

> "* * * This court should not place the stamp of approval upon the sweeping away of the clause of the Act relating to the agricultural laborer, nor should it, by implication, prejudice the fundamental rights of the farmers who are not parties to this litigation." (R. 796.)

and again

> "* * * If as realists, we take any account of the facts, there is then no obstacle to the extension of like organization and regulation of agricultural laborers in the operations of planting the seed and preparing the ground." (R. 795.)

and Judge Fee likewise said:

> "* * * If the implication of the findings of the Board, as affirmed by the majority, are that he must employ a union crew under such circumstances simply because he also warehouses and sells potatoes bought from others, then no potato grower in Idaho can escape regulation, notwithstanding the plain language of Congress." (R. 794.)

Conclusion

It is respectfully submitted that a writ of certiorari should be issued.

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Dated at Boise, Idaho,
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